

No. 11724

United States
Circuit Court of Appeals
For the Ninth Circuit.

A. J. GOERIG AND CLYDE PHILP,

Appellants,

vs.

CONTINENTAL CASUALTY COMPANY,
a Corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Eastern District of Washington
Southern Division

FILED
NOV 28 1947

PAUL P. O'BRIEN
CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	8
Answer and Cross-Complaint.....	11
Appeal:	
Notice of.....	33
Statement of Points on.....	34
Bond for Costs on.....	35
Bond for Costs on Appeal.....	35
Clerk's Certificate	37
Complaint	2
Findings of Fact and Conclusions of Law.....	19
Conclusions of Law.....	25
Findings of Fact.....	20
Judgment and Decree.....	27
Motion for New Trial.....	30
Names and Addresses of Attorneys of Record..	1
Notice of Appeal.....	33
Order Denying Motion for New Trial.....	32
Order on Pre-Trial Hearing.....	17
Reply and Answer to Answer and Cross-Com- plaint of the Continental Casualty Company.	15
Statement of Points on Appeal.....	34
Stipulation	40

NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

BROWN & HAWKINS,

Miller Building,
Yakima, Washington,

Attorneys for A. J. Goerig and
Clyde Philp, Defendants and Appellants.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

Insurance Building,
Seattle 4, Washington,

Attorneys for Continental Casualty Co.,
Defendant and Appellee.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Court No. 255

THE UNITED STATES OF AMERICA FOR
THE USE OF UNION CONCRETE PIPE
CO., INC., a Washington corporation,

Plaintiff,

vs.

SAM MACRI, JOE MACRI, DON MACRI,
CLYDE PHILP and A. J. GOERIG, co-part-
ners and joint adventurers d/b/a Macri &
Company, and CONTINENTAL CASUALTY
COMPANY, an Indiana corporation,

Defendants.

COMPLAINT

Comes Now the Plaintiff and for cause of action
against the Defendants above named, and each of
them, alleges as follows, to-wit:

1.

That at all times herein mentioned the Plaintiff,
Union Concrete Pipe Co., Inc., is a Washington
corporation duly licensed to do business in the State
of Washington and has paid all license fees due
thereunder.

2.

That this action is brought in the name of the United States as Plaintiff for the use of Union Concrete Pipe Co., Inc., under and by virtue of the authority granted by an Act of Congress approved August 24, 1935 (c. 642, Sections 1 and 2, 49 Statutes at Large 793 and 794, Title 40, USCA Section 270 A, 270 B). Said Plaintiff at all times herein set forth has been and now is a citizen of the State of Washington.

3.

That at all times herein mentioned the Defendants Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig were and now are co-partners or joint adventurers doing business as Macri & Company. That said Defendants will hereafter be referred to as Macri & Company. That at all times said Defendants were and now are citizens of the State of Washington.

4.

That at all times herein mentioned the Defendant Continental Casualty Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Indiana, carrying on a general surety business and authorized as such as carry on such surety business in the State of Washington. That said defendant and Continental Casualty Company is a citizen of the State of Indiana.

5.

That on or about May 18, 1944, the United States of America through the Department of Interior and Macri & Company made and entered into a certain contract, being Contract No. 1068 of the Roza Division of the Yakima Project, Washington, being also known as Contract No. 12r-14996, wherein and whereby said Defendant contractors, Macri & Company, contracted to furnish materials and perform work in accordance with said contract for the sum of \$169,667.50.

6.

That on or about May 18, 1944, to secure faithful performance of said contract and the prompt payment to all persons supplying labor and materials employed or used in the prosecution and completion of the work provided for in said contract, said Defendants, Macri & Company, as principals, and Continental Casualty Company, an Indiana Corporation, as surety, made, executed and delivered to the United States of America as obligee a bond or undertaking as required by law in the sum of \$84,833.75; that said bond was conditioned that if the said Defendants, Macri & Company, should promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract above-described, the said bond should be void, but otherwise to remain in full force and effect. That upon the award of such contract to the Defendants, Macri & Company,

said bond became binding and ever since has remained in full force and effect.

7.

That the aforesaid contract No. 1068 was, and now is, a contract for the prosecution and completion of a public work of the United States within the meaning of the Act of Congress referred to above, which said contract was performed and executed in Yakima County in the Eastern District of Washington.

8.

That some time previous to the first day of January, 1945, the Plaintiff at the special instance and request of the Yakima Cement Products Co., a subcontractor of Defendants Macri & Company, agreed to deliver to Macri & Company certain concrete pipe. Subsequent thereto said Plaintiff did deliver, and there was accepted by said Macri & Company between the dates of January 26 and June 13, 1945, concrete pipe of the agreed and reasonable value of \$12,602.59. That said Macri & Company dealt directly with said Plaintiff so no written agreement or sub-contract was entered into between them. That upon said price of \$12,602.59 Defendants paid \$6,000.00 on the 21st of April, 1945, and \$1,607.91 on June 6, 1945, said payments being made directly to said Plaintiffs. That all deliveries were made directly to Macri & Company and were unloaded and delivered subject to the direction of Macri & Company and/or its agents.

9.

That within ninety days after the last material was furnished to said Defendant Macri & Company, to-wit: On or about the 11th day of August, 1945, said Plaintiff gave written notice to said Defendant of the amount claimed and material furnished, said notice being served by mailing the same by registered mail, postage prepaid, in an envelope addressed to said Defendants at its last known address, and a return card for which was received by said Plaintiff.

10.

That Plaintiff has made repeated demands on said Macri & Company for the payment of the unpaid balance of \$4,994.68, but said Defendants, Macri & Company, and each of them, have failed, neglected and refused to pay said amount and the same is now due and owing, together with interest at 6% per annum from June 13, 1945, until paid.

11.

That more than ninety days have elapsed since the last work, labor and materials were furnished by Plaintiff, Union Concrete Pipe Co., Inc., as hereinabove set forth, and less than one year has elapsed since the complete performance and final settlement of contract herein referred to as No. 1068 was made. That final settlement under said contract was made on or about October 15, 1945.

12.

That the ground upon which the jurisdiction of this Court is invoked is that the action arises under the Act of Congress, referred to above, which expressly directs the bringing of said action in this Court, to-wit: The United States District Court, Eastern District of Washington, Southern Division, being the District in which said contract was to be and was performed and completed.

Wherefore, Plaintiff demands judgment in favor of the United States for the use and benefit of the Union Concrete Pipe Co., Inc., a corporation, against the Defendants, and each of them, in the sum of \$4,994.68, together with interest thereon at the legal rate of 6% per annum from the 1st day of June, 1945, until paid, and for said Plaintiff's costs and disbursements herein incurred and expended, and for such other and further relief as to the Court may seem meet and proper in the premises.

VELIKANJE & VELIKANJE,
/s/ K. F. VELIKANJE,
Of Counsel,
Attorneys for Plaintiff.

State of Washington,
County of Yakima—ss.

Frank H. Souther, being first duly sworn, on oath deposes and says: That he is the Secretary-Treasurer of the Union Concrete Pipe Co., Inc., a Wash-

ington corporation, and as such is authorized to verify this complaint; that he has read the foregoing complaint, knows the contents thereof and and the same is true as he verily believes.

/s/ FRANK H. SOUTHER.

Subscribed and Sworn to before me this 2nd day of March, 1946.

[Seal] /s/ E. F. VELIKANJE,
Notary Public in and for the State of Washington,
residing at Yakima.

Filed March 2, 1946.

[Title of District Court and Cause.]

ANSWER

Comes now the defendants Clyde Philp and A. J. Goerig and for answer to plaintiff's complaint admit, deny and alleges as follows:

1.

For answer to paragraph 1 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 1.

2.

For answer to paragraph 2 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 2.

3.

For answer to paragraph 3 of plaintiff's complaint these answering defendants deny each and every allegation referred to in said paragraph 3 and particularly deny that Clyde Philp or A. J. Goerig were partners, co-partners or joint adventurers with the other named defendants or any of them. That any relationship existing between the defendants and these answering defendants was terminated prior to the incurring of liability, if any, referred to or alleged in plaintiff's complaint.

4.

For answer to paragraph 4 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 4.

5.

For answer to paragraph 5 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation therein contained.

6.

For answer to paragraph 6 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation in said paragraph 6 contained.

7.

For answer to paragraph 7 of plaintiff's complaint these answering defendants not being in-

formed as to the truth or falsity thereof deny each and every allegation therein contained.

8.

For answer to paragraph 8 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 8.

9.

For answer to paragraph 9 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 9.

10.

For answer to paragraph 10 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 10.

11.

For answer to paragraph 11 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each and every allegation contained in said paragraph 11.

12.

For answer to paragraph 12 of plaintiff's complaint these answering defendants not being informed as to the truth or falsity thereof deny each

and every allegation contained in said paragraph 12.

Wherefore, these answering defendants having fully answered plaintiff's complaint pray that the same be dismissed with prejudice and that these answering defendants be granted judgment against the plaintiff and against the Union Concrete Pipe Co., Inc., for their costs and disbursements taxable by law.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants

Clyde Philp and

A. J. Goerig.

Service accepted and copy received of the foregoing Answer this 27th day of March, 1946.

VELIKANJE & VELIKANJE,

/s/ E. F. VELIKANJE,

Attorneys for Plaintiff.

Filed May 17, 1946.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Continental Casualty Company, a corporation, and in answer to plaintiff's complaint, admits, denies and alleges as follows, to-wit:

First Defense

I.

This answering defendant admits Paragraphs I, II, III, V, VI, VII, XI and XII of plaintiff's complaint.

II.

This answering defendant admits Paragraph IV of plaintiff's complaint and further states that said defendant, Continental Casualty Company, is licensed and authorized to do business in the State of Washington and has paid its last and all other license fees due or owing to said State.

III.

This answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth or veracity of the allegations contained in Paragraphs VIII, IX, and X and therefore denies said paragraphs and each and every part thereof and specifically denies that this answering defendant is indebted to the plaintiff in the sum of \$4994.68 or any other sum whatsoever or at all.

Cross-Complaint

Comes now this answering defendant and for cross-complaint against Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers d/b/a Macri & Company and alleges as follows, to-wit:

I.

This cross-complaining defendant, Continental Casualty Company, realleges and makes a part hereof as though fully set forth at length Paragraphs I, II, III, IV, V, VI, VII, XI, and XII of plaintiff's complaint.

II.

That in connection with the issuance of defendant Continental Casualty Company's payment bond above mentioned and as part of the consideration for the issuance thereof, the defendant Macri & Company for and on behalf of each of the defendants above named as co-partners and joint adventurers did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things, said application for bond contains the following words and phrases, to-wit:

"Second. To indemnify the company against all loss, costs, damages, expenses and attorney's fee whatever and any and all liability therefor sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained."

III.

That in the event use plaintiff in this case recovers judgment against Continental Casualty Com-

pany, then under the terms of said bond application and said bond, the said defendant, Continental Casualty Company, is entitled to and hereby demands judgment in an equal amount, plus costs and attorney's fees, against each of the above named co-partners and joint adventurers and each of them jointly and severally.

Wherefore, having fully answered the plaintiff's complaint, this defendant, Continental Casualty Company, prays that said complaint be dismissed and held for naught and further demands that in the event that judgment is rendered in favor of use plaintiff against Continental Casualty Company, that it have and recover judgment in an equal amount, plus its costs and disbursements of this suit and a reasonable attorney's fee to be fixed by said Court, against each of the above named individual defendants doing business as Macri & Company, co-partners and joint adventurers, and each of them jointly and severally.

SKEEL, McKELVEY, HENKE,
EVENSON & UHLMANN,

By WILLARD E. SKEEL.

United States of America,
State of Washington,
County of King—ss.

Warner M. Bruce, being first duly sworn, on oath deposes and says: That he is superintendent of Continental Casualty Company, a corporation, the de-

fendant in the above entitled action; that he makes this verification for and on behalf of said corporation; that he is authorized so to do; that he has read the foregoing instrument, knows the contents thereof and believes the same to be true.

WARNER M. BRUCE.

Subscribed and sworn to before me this 11th day of March, 1946.

[Seal] K. VAN IORNS,
Notary Public in and for the State of Washington,
residing at Seattle.

Copy received 3/14/46. Brethorst, Holman,
Fowler & Dewar, Attys. for Defts. Macri.

Filed March 15, 1946.

[Title of District Court and Cause.]

REPLY AND ANSWER TO ANSWER AND
CROSS-COMPLAINT OF THE CONTI-
NENTAL CASUALTY COMPANY, ONE OF
THE ABOVE NAMED DEFENDANTS

Come now Clyde Philp and A. J. Goerig, two of the above named defendants, and for reply and answer to the answer and cross-complaint of the Continental Casualty Company, one of the above named defendants, admit, deny and allege as follows:

I.

For answer to the preamble and the first paragraph of said defendant Continental Casualty Company's cross-complaint these answering defendants deny each and every allegation therein contained or referred to and particularly deny that at any time material hereto these answering defendants were partners, co-partners or joint adventurers with Sam Macri, Joe Macri or Don Macri, or any of them, and that in any event the liability, if any, alleged in said cross-complaint arose subsequent to the termination of the relationship, if any, between these answering defendants and said defendants Sam Macri, Joe Macri or Don Macri, and that these answering defendants have no liability with respect thereto.

2.

For answer to paragraph 2 of said defendant Continental Casualty Company's cross-complaint these answering defendants not being advised as to the truth or falsity thereof deny each and every allegation contained in said paragraph 2.

3.

For answer to paragraph 3 of said defendant Continental Casualty Company's cross-complaint these answering defendants deny each and every allegation therein contained.

Wherefore, these answering defendants having fully replied to and answered the answer and cross-

complaint of the Continental Casualty Company, pray that said cross-complaint be dismissed with prejudice and that these answering defendants be given judgment against the Continental Casualty Company for their costs and disbursements taxable by law.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for defendants

Clyde Philp and

A. J. Goerig.

Filed March 15, 1946.

[Title of District Court and Cause.]

ORDER ON PRE-TRIAL

Pursuant to an order for pre-trial under Rule 16 of the Rules of Civil Procedure for the District Courts, this cause came on for hearing on the 7th day of January, 1947.

Fred Velikanje appearing as attorney for the plaintiff;

Thomas Holman and A. T. Bateman appearing as attorneys for defendants Macri;

Nat U. Brown appearing as attorney for defendants Goerig and Philp;

Willard E. Skeel appearing as attorney for Continental Casualty Company.

It is stipulated that any party to this cause may offer in evidence any of the documents marked for

identification in cause #267 without objections as to signatures and authenticity of such document.

It is further stipulated that use plaintiff is entitled to judgment in the amount of \$4994.68 subject to judgment being appropriately fixed as to judgment debtors, and that all of the claim is on specification #1068 and subject also to the determination of whether or not the use plaintiff's claim for interest is valid.

It is further stipulated that there are no written agreement between the defendants Macri and defendants Goerig and Philp other than defendants Macri Identification "1" and "2" and defendants Goerig and Philp Identification "1" pertaining to Specifications #1062 and #1068.

It is further stipulated that the use plaintiff is a corporation and that its last annual license fees have been paid and it has a full right to sue.

It is further stipulated that the Continental Casualty Company is a corporation licensed to do business in the State of Washington and has paid its last and all other license fees.

It is further stipulated that at the time of entering the principal contracts, the defendants Sam Macri, Joe Macri and Don Macri were and are still co-partners doing business under the firm name and style of Macri & Company and are all residents of the City of Seattle in the Western District of Washington.

It is further stipulated that this cause be consolidated with causes numbered 250, 251, 257 and 267

for the trial of the remaining issues and be tried on February 19, 1947, at 10:00 a.m.

It Is Ordered and Adjudged that the above stipulations be and the same are hereby approved and made a part of the record in the above entitled cause.

Dated this 27th day of January, 1947.

SAM M. DRIVER,
United States District Judge.

Filed Jan. 27, 1947.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The above-entitled matter coming on regularly for trial in open court, plaintiff appearing by and through its attorneys, Velikanje & Velikanje; and the defendants Sam Macri, Joe Macri and Don Macri appearing by and through their attorneys, Brethorst, Holman, Fowler & Dewar; and defendants Clyde Philp and A. J. Goerig appearing by and through their attorneys, Brown & Hawkins; and the defendant Continental Casualty Company appearing by and through its attorneys, Skeel, McKelvy, Henke, Evenson & Uhlmann; and the Court hearing evidence and being fully advised in the premises does now make the following

Findings of Fact

1.

That at all times herein mentioned, the plaintiff, Union Concrete Pipe Co., Inc., is a Washington corporation duly licensed to do business in the State of Washington, and has paid all license fees due thereunder.

2.

That this action is brought in the name of the United States as plaintiff for the use of Union Concrete Pipe Co., Inc., under and by virtue of the authority granted by an Act of Congress approved August 24, 1935 (c. 642, Sections 1 and 2, 49 Statutes at Large 793 and 794, Title 40, USCA Section 270 A, 270 B). Said plaintiffs at all times herein set forth has been and now is a citizen of the State of Washington.

3.

That at all times herein mentioned, the defendants Sam Macri, Joe Macri, Don Macri, were co-partners doing business as Macri & Company. That the defendants Clyde Philp and A. J. Goerig had been previously associated with said named Macris under a joint-venture agreement. That all of the last named defendants were and now are citizens of the State of Washington.

4.

That at all times herein mentioned, the defendant Continental Casualty Company was and now is a

corporation organized and existing under and by virtue of the laws of the State of Indiana, carrying on a general surety business and authorized as such to carry on such surety business in the State of Washington. That said defendant, Continental Casualty Company, is a citizen of the State of Indiana.

5.

That on or about May 18th, 1944, the United States of America, through the Department of Interior and Macri & Company, made and entered into a certain contract being Contract No. 1068 of the Roza Division of the Yakima Project, Washington, being also known as Contract No. 12r-14996, wherein and whereby said Defendant contractors, Macri & Company, contracted to furnish materials and perform work in accordance with said contract for the sum of \$169,667.50.

6.

That on or about May 18th, 1944, to secure faithful performance of said contract and the prompt payment to all persons supplying labor and materials employed or used in the prosecution and completion of the work provided for in said contract, said defendants, Macri & Company, as principals, and Continental Casualty Company, an Indiana Corporation, as surety, made, executed and delivered to the United States of America, as obligee, a bond or undertaking as required by law in the sum of \$84,833.75; that said bond was conditioned that if the said defendants Macri & Company should

promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in the contract above-described, the said bond should be void, but otherwise to remain in full force and effect. That upon the award of such contract to the defendants, Macri & Company, said bond became binding and ever since has remained in full force and effect.

7.

That the aforesaid contract No. 1068 was, and now is, a contract for the prosecution and completion of a public work of the United States within the meaning of the Act of Congress referred to above, which said contract was performed and executed in Yakima County in the Eastern District of the State of Washington.

8.

That some time previous to the first day of January, 1945, the plaintiff, at the special instance and request of the Yakima Cement Products Co., a sub-contractor of defendants Macri & Company, agreed to deliver to Macri & Company certain concrete pipe. Subsequent thereto said plaintiff did deliver, and there was accepted by said Miera & Company between the date of January 26 and June 13, 1945, concrete pipe of the agreed and reasonable value of \$12,602.59. That said Macri & Company dealt directly with said plaintiff, so no written agreement or sub-contract was entered into between them. That

upon said price of \$12,602.59, defendants paid \$6,000.00 on the 21st day of April, 1945, and \$1,607.91 on June 6, 1945, said payments being made directly to said plaintiffs. That all deliveries were made directly to Macri & Company and were unloaded and delivered subject to the direction of Macri & Company and/or their agents.

9.

That within ninety days after the last material was furnished to said defendant Macri & Company, to-wit: On or about the 11th day of August, 1945, said plaintiff gave written notice to said defendant of the amount claimed and material furnished, said notice being served by mailing the same by registered mail, postage prepaid, in an envelope addressed to said defendants at their last known address, and a return card for which was received by said plaintiff.

10.

That more than ninety days had elapsed from the last work and materials furnished by plaintiff from the time of furnishing to the beginning of suit, and less than one year had elapsed since the complete performance and final settlement of contract, herein referred to as No. 1068, was made. The final settlement under said contract being made on or about October 15, 1945.

11.

That the ground upon which the jurisdiction of this Court is invoked is that the action arises under

the Act of Congress, referred to above, which expressly directs the bringing of the said action in this Court, to-wit: The United States District Court, Eastern District of Washington, Southern Division, being the District in which said contract was to be and was performed and completed.

12.

That plaintiff had made demand upon Macri & Company for the payment of the unpaid balance of \$4,994.68, but said defendants Macri & Company had failed, neglected and refused to pay said amount, or any part thereof, or the interest thereon from June 13, 1945.

13.

That in connection with the issuance of defendant Continental Casualty Company's payment bond, above-referred to, and as part of the consideration for the issuance thereof, defendant Macri & Company for and on behalf of each of the defendants above-named as co-partners and joint adventurers, to-wit: Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, did execute and sign an application directed to Continental Casualty Company for the purpose of procuring said payment bond. That among other things said application for bond contains the following words and phrases to-wit:

“Second. To indemnify the company against all loss, costs, damages, expenses and attorney's fees whatever, and any and all liability therefor

sustained or incurred by the company by reason of executing said bond or bonds or any of them; in making any investigation on account thereof; in prosecuting or defending any action brought in connection therewith; in obtaining release therefrom, and in enforcing any of the agreements herein contained."

14.

That the relationship of joint adventurers or co-partners existing between the defendants Sam Macri, Joe Macri and Don Macri as first parties and Clyde Philp and A. J. Goerig as other parties were terminated prior to the incurring of the liability of the plaintiff herein.

The Court having heretofore made and entered its Findings of Fact does now make the following

Conclusions of Law

1.

The use plaintiff, Union Concrete Pipe Co., Inc., a Washington corporation, is entitled to judgment in the amount of \$4,994.68, together with interest thereon at the rate of 6% per annum from June 13, 1945, until paid, together with its costs herein incurred, against the defendants, Sam Macri, Joe Macri, Don Macri, co-partners, doing business as Macri & Company, and Continental Casualty Company, an Indiana corporation.

2.

The Continental Casualty Company, an Indiana corporation, is entitled to judgment on its cross-

complaint against the defendants, Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers, doing business as Macri & Company in the amount of \$4,994.68, with interest thereon at the rate of 6% per annum from June 13, 1945, together with reasonable attorneys' fees in the amount of \$200.00, together with their costs and disbursements herein incurred.

3.

The defendants A. J. Goerig and Clyde Philp are entitled to a judgment of dismissal against the defendants Sam Macri, Joe Macri and Don Macri on the latters' cross-complaint against A. J. Goerig and Clyde Philp without costs.

4.

The defendants Sam Macri, Joe Macri and Don Macri, are entitled to a judgment of dismissal against the defendants A. J. Goerig and Clyde Philp on the latters' cross-complaint against the Macris without costs.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

VELIKANJE & VELIKANJE,

By E. F. VELIKANJE.

Filed May 1, 1947.

In the District Court of the United States for the
Eastern District of Washington, Southern
Division

Civil No. 255

THE UNITED STATES OF AMERICA for the
use of UNION CONCRETE PIPE CO., INC.,
a Washington corporation,

Plaintiff,

vs.

SAM MACRI, JOE MACRI, DON MACRI,
CLYDE PHILP and A. J. GOERIG, co-part-
ners and joint adventurers d/b/a Macri &
Company, and CONTINENTAL CASUALTY
COMPANY, an Indiana corporation,

Defendants.

JUDGMENT AND DECREE

The above-entitled matter coming on for hearing
in open court, the use plaintiff, Union Concrete Pipe
Co., Inc., appearing by and through their attorneys,
Velikanje & Velikanje, E. F. Velikanje of counsel;
the defendants Sam Macri, Joe Macri and Don
Macri appearing by and through their attorneys,
Brethorst, Holman, Fowler & Dewar, Tom W. Hol-
man of counsel; the defendants Clyde Philp and
A. J. Goerig appearing by and through their attor-
neys Brown & Hawkins, Kenneth C. Hawkins of
counsel; and defendant Continental Casualty Com-

pany appearing by and through its attorneys Skeel, McKelvy, Henke, Evenson and Uhlmann, Willard E. Skeel of counsel; and the Court hearing evidence and being fully advised in the premises, and having heretofore entered its Findings of Fact and Conclusions of Law;

It Is, Now, Here Ordered, Adjudged and Decreed That the use plaintiff, Union Concrete Pipe Co., Inc., a Washington corporation, be and it is hereby granted judgment in the amount of Four Thousand Nine Hundred Ninety-four and 68/100 Dollars (\$4,994.68) together with interest at six per cent (6%) per annum from June 13, 1945, upon said amount, together with their costs and disbursements herein incurred taxed at \$35.25, against the defendants Sam Macri, Joe Macri and Don Macri, co-partners, doing business as Macri & Company, and against the Continental Casualty Company, an Indiana corporation; and use plaintiff's cause of action as against the defendants Clyde Philp and A. J. Goerig is dismissed without costs.

It Is Further Ordered, Adjudged and Decreed that the Continental Casualty Company, an Indiana Corporation, is entitled to judgment against the defendants Sam Macri, Joe Macri, Don Macri, Clyde Philp and A. J. Goerig, co-partners and joint adventurers doing business as Macri & Company in the amount of Four Thousand Nine Hundred Ninety-four and 68/100 Dollars (\$4,994.69), with interest thereon at the rate of six per cent (6%) per annum from June 13, 1945, together with rea-

sonable attorneys' fees in the amount of Two Hundred Dollars (\$200.00), together with their costs and disbursements herein incurred taxed at \$.
none.

It Is Further Ordered, Adjudged and Decreed that A. J. Goerig and Clyde Philip are granted a judgment of dismissal as against the defendants Sam Macri, Joe Macri and Don Macri on the latters' cross-complaint, without costs.

It Is Further Ordered, Adjudged and Decreed that the defendants Sam Macri, Joe Macri and Don Macri are granted a judgment of dismissal against the defendants A. J. Goerig and Clyde Philip on the latters' cross-complaint, without costs.

Done in Open Court this 1st day of May, 1947.

SAM M. DRIVER,

United States District Judge.

Presented by:

VELIKANJE & VELIKANJE,

By E. F. VELIKANJE.

Filed May 1, 1947.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the defendants, A. J. Goerig and Clyde Philp and respectfully move the court for the entry of an order setting aside the judgment heretofore entered herein and entering judgment in favor of these defendants or in the alternative granting these defendants a new trial upon the grounds and for the following reasons:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which the losing party was prevented from having a fair trial;

2. Misconduct of the prevailing party, his attorney or the jury;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

5. Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

6. Insufficiency of the evidences to justify the verdict or decision;

7. Error in law occurring at the trial;

8. Where the right to procure a transcript

of the testimony or proceedings has been lost without any fault or negligence on the part of the losing party.

The particular error relied upon by these defendants in moving for said new trial is the ruling and judgment of the court that the defendant, Continental Casualty Company is entitled to judgment over and against these defendants notwithstanding the plaintiff obtained no judgment against these defendants; that under the bond and application these defendants are obligated to indemnify the Continental Casualty Company only against liability for which these defendants are responsible.

The particular error relied upon by these defendants in moving for said new trial is the ruling of the court that the termination agreement did not absolve these defendants from all liabilities.

This motion is based upon the pleadings and papers on file herein, upon the evidence given at the trial, and upon the minutes of the court.

NAT. U. BROWN,
KENNETH C. HAWKINS,
Attorneys for Defendants
A. J. Goerig and
Clyde Philp.

Copy received this 12th of May, 1947.

VELIKANJE & VELIKANJE.

Filed May 12, 1947.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter having come on for argument on the 20th of May, 1947, before the Hon. Sam M. Driver, United States District Judge, upon the motion of defendants, A. J. Goerig and Clyde Philp, for a new trial; and the Court having listened to argument and believing that the Court's original decision in this matter was correct that none of the grounds for defendants' motion for new trial exist or are well taken; and the Court being otherwise fully advised in the premises, it is Now, Therefore,

Ordered, Adjudged and Decreed that the motion for new trial of defendants, A. J. Goerig and Clyde Philp, be and the same is hereby denied, to all of which said defendants, A. J. Goerig and Clyde Philp, except and their exception is allowed.

Done in Open Court this 20th day of May, 1947.

SAM M. DRIVER,
Judge.

Presented by:

WILLARD E. SKEEL.

Filed May 20, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that A. J. Goerig and Clyde Philp, two of the defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment and decree entered in the above entitled action on the 1st day of May, 1947, and from order denying A. J. Goerig and Clyde Philp's motion for new trial entered on the 20th day of May, 1947.

NAT. U. BROWN,

KENNETH C. HAWKINS,

Attorneys for Appellants

A. J. Goerig and

Clyde Philp.

Mailed copies to: Velikanje & Velikanje, Miller Bldg., Yakima, Wash.; Skeel, McKelvy, Henke, Evenson & Uhlmann, Ins. Bldg., Seattle, Wash.; Brethorst, Holman, Fowler & Dewar, 17th Floor Hoge Bldg., Seattle, Wash., this 29th day of July, 1947.

A. A. LaFRAMBOISE,

Clerk.

By MARIE EALY,

Deputy.

Filed July 29, 1947.

[Title of District Court and Cause.]

APPELLANTS A. J. GOERIG AND CLYDE
PHILP'S STATEMENT OF POINTS ON
APPEAL

I. The United States District Court was in error in entering judgment against Clyde Philp and A. J. Goerig in favor of the Continental Casualty Company for the following reasons:

1. The materials or labor furnished by the use plaintiff were furnished with respect to specification 1068, and the obligation which the bonding company was obligated to pay was therefore with respect to specification 1068. Goerig and Philp did not enter into any joint venture agreement with respect to 1068 and were not co-partners or co-adventurers of Macri & Company with respect to specification 1068, and were not therefore liable to indemnify or compensate the Continental Casualty Company for any moneys which it was required to pay on its bond with respect to specification 1068.

2. Goerig and Philp did not sign and were not parties to the application for the bond or to the bond itself.

3. The Continental Casualty Company did not rely on credit of Goerig and Philp and did not know they were connected with the Macri Company.

4. Goerig and Philp received no proceeds or benefits from the bond, nor did Macri & Company while Goerig and Philip were its silent "partners."

5. The "silent" partnership was terminated prior to affixing of liability on the bond.

6. Parties to a contract can modify or alter same—or rescind it—even though there be a creditor beneficiary, unless and until the creditor beneficiary has changed his position in reliance thereon.

7. A principal is not liable to a surety for an indebtedness that is not the obligation of the principal, even though, for some other reason the surety is liable to the creditor.

II. The United States District Court was in error in denying Goerig and Philp's motion for a new trial for the reasons specified in paragraph I hereof.

KENNETH C. HAWKINS,
NAT. U. BROWN,

Attorneys for Appellants

A. J. Goerig and
Clyde Philp.

Filed July 30, 1947.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, Clyde Philp and A. J. Goerig, the Defendants above named, as Principal and the Manufacturers Casualty Insurance Company, a corporation organized under the laws of the State of Penn-

sylvania, and legally doing business in the State of Washington as Surety are held and firmly bound unto Sam Macri, Joe Macri and Don Macri, d/b/a Macri & Company and the Continental Casualty Company, and the Union Concrete Pipe Co., Inc., in the just and full sum of Two Hundred Fifty Dollars (\$250.00) for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of July, 1947.

The Condition of This Obligation Is Such, That, Whereas, the above named Plaintiff, Union Concrete Pipe Co., Inc., on the 1st day of May, 1947, in the above entitled action and Court, recovered judgment against the Defendants, Sam Macri, et al., and Continental Casualty Company, above named, for \$4,994.68. Interest from June 13, 1945, and the Continental Casualty Company recovered judgment over against A. J. Goerig and Clyde Philp for said sums and an attorneys fee of \$200.00.

And Whereas, The above named Principals have heretofore given due and proper notice that they appeal from said decision and judgment of said District Court to the Circuit Court of Appeals for the Ninth Circuit.

Now, Therefore, If the said Principals, A. J. Goerig & Clyde Philp, shall pay Union Concrete Pipe Co., Inc., Sam Macri, Don Macri and Joe Macri, and the Continental Casualty Company, all costs and damages that may be awarded against

them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

A. J. GOERIG,

CLYDE PHILP,

[Seal]

MANUFACTURERS

CASUALTY INSURANCE

COMPANY,

By A. A. NAEF,

Attorney-in-Fact.

[Endorsed]: Filed July 29, 1947.

[Title of District Court and Cause.]

United States of America,

Eastern District of Washington—ss.

CLERK'S CERTIFICATE

I, A. A. LaFramboise, Clerk of the United States District Court for the Eastern District of Washington do hereby certify the foregoing typewritten pages, numbered 1 to 56, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings, in the above entitled cause, as are necessary to the hearing of the appeal therein as called for by the designation of record on appeal filed by counsel for the Appellants, A. J. Goerig and Clyde Philp, as the same now remains on file and

of record in my office and that the same constitutes the record on appeal of said Appellants from the judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that included in this record on appeal is a copy of all exhibits designated by counsel for Appellants.

I further certify that "the memorandum decision of the Honorable Sam M. Driver dated March 27, 1947" as called for in the Supplemental Designation of the Appellee Continental Casualty Company, is not included in this record on appeal for the reason that no such document was signed or filed in this case.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record as called for in the designation of record on appeal of the Appellants amount to \$9.60 and the same has been paid in full by Brown & Hawkins, attorneys for said Appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Yakima, Washington, in said district, this 28th day of August, 1947.

[Seal]

A. A. LaFRAMBOISE,

Clerk of said District Court.

By /s/ THOMAS GRANGER,

Deputy.

[Testimony of A. J. Goerig and Clyde Philp is set forth on pages 20 to 39. Stipulated portions of exhibits as called for in designation are set out on pages 58 to 114 of companion cause No. 11722.]

[Endorsed]: No. 11724. United States Circuit Court of Appeals for the Ninth Circuit. A. J. Goerig and Clyde Philp, Appellants., vs. Continental Casualty Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Southern Division.

Filed September 2, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

[Adoption of Points on Appeal is set out on page 115 of companion cause No. 11722.]

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

It is hereby stipulated by and between Counsel for the respective parties on appeal herein that the above entitled cause may be consolidated for the purpose of printing the record herein and for the purpose of printing the briefs herein and for the purpose of argument.

It is further agreed and stipulated that the Clerk in preparing the printed transcript of the record shall print one (1) only of the following matters previously designated in each of the above captioned cases in the designation and contents of record on appeal:

Testimony of A. J. Goerig.

Testimony of Clyde Philp.

Plaintiff's Exhibit "A"—contract and bond with respect to specification 1062.

Plaintiff's Exhibit "B"—contract and bond with respect to specification 1068.

Plaintiff Continental Casualty Company's Exhibit "1"—application for bond with respect to specification 1062.

Plaintiff Continental Casualty Company's Exhibit "2"—application for bond with respect to specification 1068.

Defendant Macri's Exhibit "1"—Joint venture agreement with respect to specification 1062.

Defendants Macri's Exhibit "2"—joint venture agreement with respect to specification 1068.

Defendants Goerig and Philp's Exhibit "1"—
termination agreement.

It is further stipulated that the Clerk in directing the printing of the transcript shall print all of the matters specified in each of the designations in all of the above captioned cases, but shall cause the same to be printed only once and shall eliminate any duplicate printing.

Dated this 17th day of September, 1947.

/s/ NAT U. BROWN,

/s/ KENNETH C. HAWKINS,

Attorneys for Appellants
Goerig and Philp.

SKEEL, McKELVY, HENKE,
EVENSON & UHLMANN,

By /s/ WILLARD E. SKEEL,

Attorneys for Appellee
Continental Casualty Company.

[Endorsed]: Filed Sept. 22, 1947.

